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No. 10-535

In the Supreme Court of the United States

RH CAPITAL ASSOCIATES LLC AND
PACIFIC INVESTMENT MANAGEMENT COMPANY LLC,
PETITIONERS

v.

MAYER BROWN LLP AND JOSEPH P. COLLINS,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a private damages claim under SEC Rule 10b-5(b) against outside counsel who allegedly participated in drafting a client's misleading statements, the element of reliance is satisfied where the statements were not attributed to the outside counsel at the time of dissemination.

2. Whether, in a private damages claim under SEC Rule 10b-5(a) and (c) against outside counsel, the element of reliance is satisfied where the outside counsel's own conduct was not communicated to the public and was not known to investors at the time they invested.

CORPORATE DISCLOSURE STATEMENT

Mayer Brown LLP is a limited liability partnership organized under Illinois law. Mayer Brown does not have a parent corporation, and no publicly held corporation owns stock in the firm.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

In this securities-law class action arising from the collapse of Refco Inc., the Second Circuit held that outside counsel who allegedly helped Refco commit securities fraud, but who were not the attributed authors of Refco's statements and whose own conduct was never disclosed to investors, cannot be held liable for a primary violation of Rule 10b-5 in a suit by private plaintiffs. In doing so, the Second Circuit applied in straightforward fashion this Court's decisions in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), and *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008). Under

those decisions, the conduct at issue in this case amounts, at most, to aiding and abetting securities fraud, which is subject to civil enforcement actions by the Securities and Exchange Commission and criminal prosecution but does not give rise to a private damages action.

The Second Circuit's decision does not conflict with any decision of another court of appeals. No court of appeals has held outside counsel primarily liable for a client's statements in a private damages action. Nor is there any reason for the Court to hold the petition pending its decision in *Janus Capital Group, Inc. v. First Derivative Traders*, No. 09-525, in which the Court is considering the distinct question of whether an investment adviser to a mutual fund—the party that creates the fund and manages it on a day-to-day basis—can be held liable for misstatements in the fund's prospectus. Unlike an investment adviser or corporate insider, respondents here—Mayer Brown LLP and one of its former partners, Joseph P. Collins—played typical secondary roles as outside counsel assisting a client that decided for itself what statements to make. The decision in *Janus* will not affect the outcome here. Further review in this case is unwarranted.

STATEMENT

A. Refco And The Fraud Masterminded By Its Officers

Refco was a leading provider of execution, clearing and brokerage services. Petitioners allege that Refco and certain of its customers suffered large trading losses in the late 1990s that would have threatened Refco's survival if it had written them off. Second Am. Compl. ¶ 435. Petitioners claim that, to conceal these losses, Refco secretly transferred the bad debts to Refco Group Holdings, Inc. (RGHI)—an entity controlled by Refco's

chief executive officer, Phillip Bennett—in return for a receivable purportedly owed by RGHI to Refco. *Id.* ¶ 439. According to the complaint, beginning in 2000, this RGHI receivable was hidden at the end of each financial reporting period by a series of "round trip" loan transactions. *Id.* ¶¶ 450-451. Petitioners contend that, as a result of those transactions, Refco's financial statements—and the offering documents pursuant to which the plaintiff class purchased Refco securities—were misleading. See, *e.g.*, *id.* ¶¶ 5, 96, 128, 578.

The "round trip" loans were merely one aspect of a more extensive fraud perpetrated by Bennett and a small group of other Refco senior executives. Bennett pleaded guilty to twenty criminal counts and is serving a sixteen-year prison sentence.[1] He has admitted that he "came up with [the] plan" to hide losses by using the RGHI receivable.[2] His chief co-conspirators—Robert Trosten (Refco's former chief financial officer) and Santo Maggio (former president of an unregulated offshore subsidiary that was used to conduct several components of the alleged fraud)—also pleaded guilty.[3] Petitioners sued those Refco insiders and many other parties, including respondents, Refco's outside auditors, and various investment banks. *E.g.*, Second Am. Compl. ¶¶ 33, 36, 41.

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[1] See, *e.g.*, *Ex-Refco Chief Sentenced to 16 Years in Cover-Up*, N.Y. Times, July 4, 2008, at C4.

[2] Sentencing Memorandum of Phillip R. Bennett, *United States v. Bennett*, 05 Cr. 1192, at 20 (S.D.N.Y. May 30, 2008).

[3] See, *e.g.*, Chris McMahon, *Refco Execs to Jail*, Futures (Chi.), Apr. 1, 2008, at 14; *Refco Ex-VP Pleads Guilty; Maggio to Testify against Colleagues*, Chi. Trib., Dec. 20, 2007, at 1.

B. Mayer Brown's Legal Services

Mayer Brown represented Refco as outside counsel beginning in 1994. Second Am. Compl. ¶ 76. Joseph Collins was the Mayer Brown partner primarily responsible for the relationship. *Id.* ¶¶ 77-78. Dennis Klejna, Refco's general counsel, who was also a named defendant in this action, "supervis[ed] [Refco's] outside legal counsel on all significant legal matters." *Id.* ¶ 39.

Petitioners do not allege that Mayer Brown lawyers made any statements to investors about Refco. Instead, petitioners seek to hold respondents liable under Rule 10b-5(b) for statements that *Refco* made in three offering documents: the offering memorandum for an unregistered bond offering in August 2004, a subsequent registration statement for a registered bond offering, and a registration statement for Refco's initial public offering of common stock in August 2005. See, *e.g.*, Second Am. Compl. ¶¶ 745-755; Pet. 4-6.

Contrary to the petition's assertions, the complaint does *not* allege that respondents had "control" over Refco's SEC filings, Pet. 26, drafted its financial statements, *id.* at 24, or "developed" Refco's fraudulent "scheme," *ibid.* Rather, the complaint alleges that, as is routine in such circumstances, Mayer Brown lawyers participated in a collaborative process controlled by Refco that ultimately produced the offering documents at issue. Thus, the complaint alleges that Mayer Brown lawyers "reviewed" or "revised" various sections of the documents, "attended numerous drafting sessions," and received drafts circulated by others. Second Am. Compl. ¶¶ 116, 170, 201.

The closest the complaint comes to making a particularized allegation of authorship is that "Collins and other Mayer Brown attorneys personally drafted certain

sections of the Offering Memorandum, including the Management Discussion & Analysis ('MD&A') section which was drafted by [Mayer Brown partner Edward] Best and reviewed by Collins." Second Am. Compl. ¶ 116. Yet even that allegation neither describes any specific false statement that was drafted by any Mayer Brown lawyer nor shows that any Mayer Brown lawyer was responsible for a falsehood appearing in the final document. By contrast, the complaint elsewhere specifically alleges that other parties played more important roles in the formulation of the same documents.[4] Even as to the MD&A section of the bond offering memorandum, which the complaint conclusorily alleges a Mayer Brown lawyer drafted, the specific allegations are that (1) Refco itself, (2) another law firm, and (3) the lead underwriter had "principal drafting" responsibility. *Id.* ¶ 115.

The documents in question do not attribute authorship of any of their content to respondents, and indeed barely mention Mayer Brown. The IPO registration statement and bond offering memorandum refer to Mayer Brown only once in the body of the documents, noting (after stating that another law firm had "passed upon the validity" of the notes and common stock) that Mayer Brown also represented Refco. See C.A. App. 632, 1061. The bond registration statement *never* refers

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[4] See Second Am. Compl. ¶¶ 174, 177 (the MD&A section of the bond registration statement was "heavily edited" by others, with "significant revisions and edits" by the bond underwriters' counsel); ¶¶ 173-174 (a drafting session that did not include Mayer Brown attorneys resulted in "significant revisions to the MD&A section"); ¶ 200 (attributing "principal drafting responsibility" for the MD&A section (and other sections) of the IPO registration statement to the underwriter defendants).

to Mayer Brown. The offering documents consistently use the first-person plural and make clear that "the terms 'Refco,' 'we,' 'our,' and 'us' refer to" Refco and its subsidiaries—confirming that it was Refco and its subsidiaries who made the representations to investors about Refco's financial condition. C.A. App. 936; accord *id.* at 461, 697.

In addition to their claim under Rule 10b-5(b), petitioners seek to hold respondents liable on a theory of scheme liability under Rule 10b-5(a) and (c) based on the firm's transactional legal work on the so-called "round trip" loans. From 2000 to 2005, Mayer Brown attorneys documented seventeen of the loan transactions to and from Refco customers that Refco and Bennett allegedly used to disguise Refco's true financial condition. Second Am. Compl. ¶¶ 451-452. Although the complaint alleges in summary fashion that respondents "design[ed]" the sham transactions, *id.* ¶ 766, the main thrust of the complaint is that respondents aided the Refco insiders' primary fraud. See, *e.g.*, *id.* ¶¶ 450-451.

Critically, petitioners do not allege that they or any other market participants were aware of respondents' alleged conduct. To the contrary, petitioners affirmatively allege that they were "ignoran[t]" of respondents' conduct at the time they purchased Refco securities. See Second Am. Compl. ¶ 771.

Petitioners also assert a claim for control-person liability under Section 20(a) of the Exchange Act, but not on the basis that Mayer Brown lawyers controlled Refco. Rather, the Section 20(a) claim is asserted against Mayer Brown on the theory that the firm controlled Collins and other individual Mayer Brown lawyers and could be held liable for any primary violation committed by them. See Second Am. Compl. ¶¶ 818-827 (Count Fifteen).

C. Procedural History

Respondents moved to dismiss the complaint for failure to state a claim, and the district court granted respondents' motion. See Pet. App. 37a-70a. The court held that, because the statements in Refco's offering documents were not attributed to Mayer Brown, respondents could not be liable for them under Rule 10b-5(b). *Id.* at 51a-58a. The district court further held that petitioners' "scheme liability" claim under Rule 10b-5(a) and (c) was foreclosed by this Court's decisions in *Stoneridge* and *Central Bank*. *Id.* at 59a-69a. Finally, the district court also dismissed petitioners' control-person claim against Mayer Brown on the ground that no claim of a primary violation had been pleaded as to Collins or any other allegedly controlled person. *Id.* at 69a-70a.

The court of appeals affirmed. See Pet. App. 1a-34a. As to petitioners' Rule 10b-5(b) claim, the court reaffirmed its settled rule that, for secondary actors to be liable in a private damages action, the false statement must be attributed to the defendant. The court emphasized that the attribution requirement stems from the element of reliance, the importance of which this Court emphasized in *Central Bank* and *Stoneridge*. *Id.* at 16a, 22a. It explained that, "[w]ithout explicit attribution to the [professional] firm, . . . reliance on that firm's participation can only be shown through 'an indirect chain . . . too remote for liability.'" *Id.* at 22a (quoting *Stoneridge*, 552 U.S. at 159). The court concluded that petitioners' Rule 10b-5(b) claim was properly dismissed because petitioners "cannot show reliance" on any statements by respondents. *Id.* at 27a. The court distinguished cases against secondary actors from those against corporate insiders, and noted that "[t]here may be a justifiable basis for holding that investors rely on the role corporate

executives play in issuing public statements even in the absence of explicit attribution." *Id.* at 26a n.6.

Turning to petitioners' Rule 10b-5(a) and (c) "scheme liability" claim, the court of appeals reasoned that the allegations against respondents were materially indistinguishable from those in *Stoneridge*, and it concluded that petitioners' claim was properly dismissed for that reason. See, *e.g.*, Pet. App. 30a. The court explained that petitioners' claim failed *Stoneridge*'s requirement that the plaintiff rely on the defendants' "*own* deceptive conduct." *Ibid.* The court found significant that petitioners had "admit[ted] that they were unaware of defendants' deceptive conduct or 'scheme' at the time they purchased Refco securities." *Id.* at 29a-30a.

Judge Parker concurred. See Pet. App. 34a-36a. He reasoned that "[t]he panel's opinion d[id] an admirable job [of] distilling a theory of Rule 10(b) liability for secondary actors from our precedents." *Id.* at 34a. At the same time, he contended that "our own precedent appears to be not invariably consistent." *Id.* at 35a.

Petitioners filed a petition for rehearing en banc, which was denied without recorded dissent.

D. Other Litigation Against Respondent Collins

The SEC brought a civil enforcement action against respondent Collins that alleged only a single count of aiding and abetting securities fraud. Compl., *SEC v. Collins*, No. 07 Civ. 11343 (S.D.N.Y. Dec. 18, 2007) <tinyurl.com/sec-complaint>. Respondent Collins consented to entry of a judgment enjoining him from future violations of the securities laws.

Although not relevant to the sufficiency of petitioners' allegations, on July 10, 2009, a jury found respondent Collins guilty of five out of fourteen counts, including one count of conspiracy to commit, *inter alia*, securi-

ties fraud, and two counts of securities fraud.[5] Private plaintiffs cannot bring conspiracy claims, see *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 842 (2d Cir. 1998), and all of the other counts—including the two securities-fraud counts—incorporated 18 U.S.C. 2(a), which makes anyone who "*aids* [or] *abets*" the commission of a crime punishable as a principal offender.

REASONS FOR DENYING THE PETITION

The petition should be denied. The decision of the court below was compelled by this Court's precedents, and it does not conflict with any decision of another court of appeals. No circuit has held outside counsel liable in a private action for statements made by a client. Moreover, there is no basis to hold the petition pending the decision in *Janus*, because the decision there will not affect the outcome of this case. As both the plaintiff and the government emphasized in *Janus*, outside counsel to a corporation play a role that is fundamentally different from that played by an investment adviser to a mutual

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[5] The jury could not reach a verdict on the remaining nine counts. Although petitioners rely on the criminal conviction, they fail to tell the Court that the case is now on appeal. In that appeal, respondent Collins has argued that (1) he was denied the opportunity to present proof that the supposed omission of fact supporting his conviction did not need to be disclosed, (2) he was denied any opportunity to present expert testimony relevant to this critical issue, and (3) the trial judge delivered a prejudicial private deadlock charge to a juror when the jury deadlocked and threats of physical violence erupted in the jury room. Petitioners also fail to tell the Court that the district court granted Collins bail pending appeal, which is only available where there is "a 'close' question or one that very well could be decided the other way." *United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985) (internal quotation marks omitted).

fund. Finally, there is no public-policy justification for granting review here, because Congress has repeatedly declined to expand the scope of the private right of action under Rule 10b-5—even after some urged it to do so for the specific purpose of reversing the decision in this case. This Court should not interfere with that judgment.

A. The Decision Below Does Not Conflict With Any Decision Of Any Other Court Of Appeals Concerning What Is Required To 'Make' A Statement

Petitioners are wrong in asserting that the decision below implicates a conflict among the circuits on what it means to "make" a statement for purposes of Rule 10b-5(b). Pet. 12-19. The Second Circuit did not address whether respondents had "made" any statement. Rather, it held that, because the statements in question were not contemporaneously attributed to Mayer Brown or Collins, "plaintiffs cannot show *reliance* on any statements of Mayer Brown" or "*reliance* on any of Collins' statements." Pet. App. 27a (emphasis added). Reliance is a separate element from whether the defendant "made" the statement in question. See, *e.g.*, *Stoneridge*, 552 U.S. at 157 (noting that the elements of a Rule 10b-5 claim include both "(1) a material misrepresentation or omission by the defendant" and "(4) reliance upon the misrepresentation or omission").

By stating that "nothing in this opinion limits the scope of liability with respect to government enforcement actions, whether civil or criminal in nature," Pet. App. 10a n.2, the Second Circuit confirmed that its decision did not turn on whether respondents "made" any statement. A holding that respondents did not "make" the statements in question would have adversely affected government enforcement actions, because both the government and private plaintiffs must show that the

defendant "made" a statement to establish primary liability under Rule 10b-5(b). By contrast, it is settled that reliance is a required element in private actions, but not in government actions. See, *e.g.*, *SEC v. Berger*, 322 F.3d 187, 193 (2d Cir. 2003).

B. The Decision Below Does Not Conflict With Any Decision Of Any Other Court Of Appeals Concerning The Need For Attribution In Claims Against Secondary Actors

Petitioners also contend that the Second Circuit's decision conflicts with decisions of other courts of appeals on the issue of whether "a [d]rafter [m]ust be [i]dentified to [s]atisfy the [e]lement of [r]eliance in a [p]rivate [a]ction." Pet. 20. There is no such conflict. The Second Circuit's decision did not address whether attribution is required as to any and all drafters of alleged misstatements; rather, the court expressly limited its holding to secondary actors, such as respondents. No decision of any other court of appeals has held that attribution is unnecessary to establish reliance against a traditional secondary actor.

1. The Second Circuit could not have been clearer as to the scope of its holding: "We hold that *a secondary actor* can be held liable in a private damages action brought pursuant to Rule 10b-5(b) only for false statements attributed to *the secondary-actor defendant* at the time of dissemination." Pet. App. 3a-4a (emphasis added; footnote omitted). Throughout its opinion, moreover, the court included the secondary-actor qualification whenever it described its attribution rule or its Rule 10b-5(b) holding, Pet. App. 12a, 16a, 18a, 20a, 21a, 22a, 23a-24a, 26a; indeed, it used the phrase "secondary actor" *40 times* in its opinion.

In addition, the Second Circuit expressly recognized the distinction between secondary actors and other types

of defendants. In particular, it noted that a number of its prior cases had held corporate insiders liable for unattributed statements. Pet. App. 17a-18a (citing *In re Scholastic Corp. Securities Litigation*, 252 F.3d 63, 75-76 (2d Cir. 2001); *Rombach v. Chang*, 355 F.3d 164, 174 (2d Cir. 2004); and *Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000)). Although the court "intimate[d] no view" on whether attribution would be required in corporate insider cases, it observed that "[t]here may be a justifiable basis" for finding reliance even in the absence of express attribution in such cases. *Id.* at 26a n.6.

2. "A genuine conflict . . . arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." Eugene Gressman et al., *Supreme Court Practice* § 4.3, at 242 (9th ed. 2007). In requiring attribution to establish reliance for *private damages claims against secondary actors*, the Second Circuit's decision does not conflict with any decision of another court of appeals.

To the contrary, the only decisions of other circuits involving similar facts follow the same attribution rule as the Second Circuit. In *Affco Investments 2001, L.L.C. v. Proskauer Rose LLP*, 625 F.3d 185 (5th Cir. 2010), decided shortly after the petition here was filed, the Fifth Circuit considered a claim by tax-shelter investors against a law firm that allegedly assisted the promoters of the tax shelters. The court found "persuasive the reasoning of the Second Circuit" and held "that explicit attribution is required to show reliance under section 10(b)." *Id.* at 194. Similarly, the Eleventh Circuit rejected a claim against a law firm that was alleged to have played a "significant role in drafting, creating, reviewing or editing ... fraudulent letters or press releases." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th

Cir. 2001) (internal quotation marks omitted). Because permitting such claims would allow private plaintiffs "to avoid the 'reliance' requirement," the Eleventh Circuit also decided to "[f]ollow[] the Second Circuit" and adopt the attribution requirement. *Id.* at 1205, 1206.

3. There is no conflict between the Second Circuit's decision and the Fourth Circuit's decision in *In re Mutual Funds Investment Litigation*, 566 F.3d 111 (4th Cir. 2009), cert. granted sub nom. *Janus Capital Group*, *supra*. The Fourth Circuit's decision addressed the unique issue of an investment adviser's liability for statements in a mutual fund prospectus. The Fourth Circuit "look[ed] to the nature of the relationship" between the defendant and the speaker, *id.* at 125, and emphasized that investment advisers "typically organize[] and operate[]" mutual funds and are "*responsible for the day-to-day operations* of the fund[s]," *id.* at 126 (emphasis added; internal quotation marks omitted). By contrast, outside counsel such as respondents have no such control.

Petitioners cite *SEC v. Wolfson*, 539 F.3d 1249 (10th Cir. 2008), but that case did not address the issue of reliance because it was an SEC enforcement action, and "the SEC need not plead or prove reliance in a § 10(b) case." *Id.* at 1260. The court's holding was expressly limited to the context of an SEC enforcement action. *Ibid.* In fact, the *Wolfson* court acknowledged "the unambiguous connection between reliance and attribution," *ibid.*; it simply had no occasion to decide whether attribution would be required in a private damages action.

City of Monroe Employees Retirement System v. Bridgestone Corp., 399 F.3d 651 (6th Cir. 2005), also does not conflict with the Second Circuit's decision. That case did not involve secondary actors but rather a corporate

parent and subsidiary. The Sixth Circuit said in a footnote that it would "not foreclose the possibility" that the subsidiary could be liable for alleged misstatements by its parent, if the subsidiary passed the misleading information to the parent. *Id.* at 686 n.29. That issue was not before the Second Circuit in this case.

Finally, while petitioners claim the Ninth Circuit does not require attribution, that court has not considered whether attribution would be necessary to show reliance in claims against secondary actors. *Howard v. Everex Systems, Inc.*, 228 F.3d 1057 (9th Cir. 2000), involved not a secondary actor but the CEO of the issuing corporation. Moreover, that case addressed the issue of what is required to "make" a statement, *id.* at 1061, not whether attribution is necessary to establish reliance. In fact, attribution was present in that case because the CEO signed the false SEC filings at issue. *Ibid.* The issue addressed by the court was whether the attributed author could be held liable despite *not* having drafted the statements in question—the converse of the issue in this case. *Ibid.*

In re Software Toolworks Inc. Securities Litigation, 50 F.3d 615 (9th Cir. 1994), involved secondary actors, but, like *Howard*, it addressed who "made" the statements at issue, not reliance. On that issue, the court adopted what has become known as the substantial-participation standard; it held that an accounting firm could be liable based on "a significant role in drafting and editing" a letter submitted by its client. *Id.* at 628 n.3. Nowhere in *Software Toolworks*—which was decided before the Second Circuit first articulated the attribution rule in *Wright v. Ernst & Young LLP*, 152 F.3d 169 (2d Cir. 1998)—did the Ninth Circuit reject an attribution requirement to show reliance or even hint that it was considering the element of reliance. Thus, it

is not surprising that both the Ninth Circuit and other courts have understood the Ninth Circuit's substantial-participation standard as relating to the "making of [a] statement" element of primary liability. *Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040, 1048 (9th Cir. 2006), vacated and remanded sub nom. *Avis Budget Group, Inc. v. Cal. State Teachers' Retirement Sys.*, 552 U.S. 1162 (2008); see *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1226-1227 & 1226 n.10 (10th Cir. 1996).

C. The Decision Below Does Not Conflict With *Stoneridge*

Petitioners assert that the Second Circuit's decision with respect to their claim under Rule 10b-5(a) and (c) conflicts with *Stoneridge*. Pet. 24. There is no conflict. To the contrary, *Stoneridge*'s clear holding that plaintiffs must rely on the defendants' "own . . . conduct," 552 U.S. at 160, is dispositive of both petitioners' scheme claim and their false-statement claim. Petitioners engage in a futile attempt to show that the Second Circuit misapplied *Stoneridge*, but this Court generally does not grant certiorari where the asserted error is "misapplication of a properly stated rule of law" to the facts of a particular case. S. Ct. R. 10.

In any event, the Second Circuit's application of *Stoneridge* to the facts pleaded by petitioners was straightforward and correct. As the Second Circuit recognized, petitioners' scheme claim suffers from the same fundamental flaw as the claim in *Stoneridge*. In both cases, investors were not aware of the transactions that the issuer of the securities used to misstate its financial condition. Indeed, petitioners affirmatively allege that they had no knowledge of respondents' conduct. See Second Am. Compl. ¶ 771. Therefore, petitioners could not have relied on that conduct, just as the

plaintiffs in *Stoneridge* did not know of, and thus could not have relied on, the transactions in that case. See *Stoneridge*, 552 U.S. at 159. And as to the false-statement claim, "[i]f a plaintiff must rely on a secondary actor's *own* deceptive conduct to state a claim under Rule 10b-5(a) and (c), it stands to reason that a plaintiff must also rely on a secondary actor's *own* deceptive statements . . . to state a claim under Rule 10b-5(b)." Pet. App. 21a.[6]

Respondents' conduct did not make Refco's fraud "necessary or inevitable." Pet. 25. As in *Stoneridge*, "[i]t was [the issuer], not respondents, that . . . filed fraudulent financial statements." 552 U.S. at 161. Although lawyers are typically their clients' agents for limited purposes, outside counsel do not decide how to report their clients' finances or whether or not to engage in transactions. Clients make those decisions, acting through their finance departments and senior manage-

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[6] Petitioners' reliance on *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), also is misplaced. See Pet. 23. That pre-*Central Bank* case did not hold that "one who drafts false portions of a registration statement filed with the SEC is liable in a private action under Section 10(b)," as petitioners suggest. Pet. 13. *Huddleston* merely held that Section 10(b) applies to conduct that is also covered by Section 11 of the Securities Act of 1933. The Court noted in a footnote that limiting the scope of Section 10(b) would effectively immunize from suit certain persons who "participat[e]" in a registration statement, including "lawyers not acting as experts," since such persons are not subject to liability under Section 11. 459 U.S. at 385 n.22. *Huddleston* was decided at a time when federal courts—including the trial court in *Huddleston*—generally recognized liability for aiding and abetting a violation of Section 10(b). Contrary to petitioners' characterization, the *Huddleston* Court did not "base[] its reasoning on primary liability," Pet. 14 n.3; rather, the Court simply noted that it had not yet decided whether aiding and abetting was actionable. *Huddleston*, 459 U.S. at 379 n.5.

ment. That was certainly the case at Refco: it was Bennett who "came up with [the] plan" to hide losses, and other senior executives conspired with him to do so. See p.3, *supra* n.2. Petitioners do not allege that respondents controlled Refco, nor would any such allegation be plausible.

Petitioners argue that, because corporations act only through their agents (and lawyers are agents for their clients), Mayer Brown became "indistinguishable from Refco itself" and "[the Mayer Brown lawyers'] conduct was Refco's conduct," Pet. 25, 26. But unlike corporate officers and employees, outside counsel are not agents of their clients for all purposes. Petitioners do not allege that Refco ever appointed Mayer Brown as its agent for making securities disclosures, much less that investors were aware of any such appointment. Petitioners' argument would simply collapse the distinctions that this Court has carefully drawn between primary actors and secondary actors; between primary liability and aiding and abetting; and between reliance on a defendant's "own conduct" and lack of reliance. It is petitioners' argument, not the Second Circuit's decision, that runs afoul of *Stoneridge* and *Central Bank*.

Petitioners attempt to muddy the application of *Stoneridge* here by emphasizing that the transactions in *Stoneridge* occurred in "the marketplace for goods and services" rather than the "investment sphere." Pet. 25. The Second Circuit correctly recognized that this distinction is irrelevant. Pet. App. 31a. Under *Stoneridge*, the critical question is not in not in which "sphere" the conduct took place; it is whether the plaintiff relied on the defendant's "own . . . conduct." 552 U.S. at 160. Because petitioners did not rely on Mayer Brown lawyers' "own conduct," their claims fail under *Stoneridge*.

D. There Is No Basis To Hold The Petition Pending The Decision In *Janus*

Contrary to petitioners' claim that "[t]his case presents similar questions to the ones pending before this Court in *Janus*," Pet. 2, this case presents the fundamentally different situation of a claim against outside counsel, as both the plaintiff in *Janus* and the government have pointed out. Consequently, there is no reason for this Court to hold the petition in this case pending the outcome of *Janus*.

1. As explained above, see p. 13, *Janus* does not involve a claim against a lawyer or any other outside professional. Rather, the issue in *Janus* is the liability of an investment adviser to several mutual funds for statements made in prospectuses issued under the funds' names. At least in the government's view, the case turns on "an investment adviser's unique and close relationship with a mutual fund." Gov't Br. at 17, *Janus*, *supra*. This Court has recognized that an investment adviser generally creates the mutual fund and operates its business. See *Jones v. Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422 (2010); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984); *Burks v. Laster*, 441 U.S. 471, 480-481 (1979).

2. As the plaintiff in *Janus* told the Court, an investment adviser "is not comparable to an independent service provider such as an auditor or outside attorney." Resp. Br. at 38, *Janus*, *supra*. Instead, as the government explained, "[a]n investment adviser's managerial role makes it essentially a corporate insider, and distinguishes it from a true secondary actor like an accountant, lawyer, or bank." Gov't Br. at 9, *Janus*, *supra*; see *id.* at 17. That distinction is borne out in this case. Investment advisers to mutual funds play a role that is completely different from the role played by outside counsel to a corporation, such as respondents. Respon-

dents did not create and manage Refco. The complaint here alleges no facts that could cast Mayer Brown in the role of corporate "insider."

3. Because of those fundamental differences, the decision in *Janus* will not affect the disposition of this case. Of course, if *Janus* results in the reversal of the Fourth Circuit's decision, which permitted the claim at issue to proceed, that reversal could not conceivably support petitioners' position in this case. Even an affirmance, however, would not affect this case if the Court limits its holding to investment advisers or otherwise makes clear that the attribution requirement applies to claims against outside counsel, as the plaintiff in that case has suggested. See Resp. Br. at 49, *Janus*, *supra* (stating that the Second Circuit decision in this case is "inapt" because it involved a true secondary actor); Tr. of Oral Arg. at 30, *Janus*, *supra* (statement by plaintiff's counsel that "this case is not about service providers"); *id.* at 38 (statement by plaintiff's counsel that "outside lawyers, I think, are distinguishable in a number of different ways"); see also Gov't Br. at 10, *Janus*, *supra* (stressing that "[t]he Court need not decide when an outside accountant or lawyer may be subject to Rule 10b-5 liability based on its involvement in creating or disseminating a statement in a client's name").

4. Finally, even if the Court were to suggest in *Janus* that the attribution requirement does not apply to claims against outside counsel, petitioners in this case still would not be able to prevail. In an alternative holding, the district court in this case held that, even under the reliance standard later adopted by the Fourth Circuit in *Janus*, petitioners failed to state a claim.

In *Janus*, the Fourth Circuit held that, in order to satisfy the reliance element of a Rule 10b-5 claim, "a

plaintiff seeking to rely on the fraud-on-the-market presumption must ultimately prove that interested investors (and therefore the market at large) would attribute the allegedly misleading statement to the defendant." 566 F.3d at 124. In this case, Judge Lynch applied that standard (which he had originally formulated in *In re Global Crossing, Ltd. Securities Litigation*, 322 F. Supp. 2d 319 (S.D.N.Y. 2004)), and held that petitioners had not alleged facts showing public understanding that Mayer Brown lawyers were responsible for Refco's statements, much less the "rather extraordinary awareness found sufficient in *Global Crossing*." Pet. App. 55a. That conclusion, moreover, was clearly correct, because no investor would attribute statements in an issuer's offering documents—which largely concern business and financial matters not generally within the expertise of a lawyer—to one of the issuer's outside law firms. Refco's documents said nothing that would give an investor any reason to believe that Mayer Brown was responsible for any statements they contained.

Nor would the result be any different in this case if, in *Janus*, the Court were to allow for primary liability against a defendant who "creates" a false or misleading statement, as the government advocates. Gov't Br. at 13, *Janus*, *supra*. The SEC filed an amicus brief in the court below advocating adoption of the same standard, but it conspicuously took no position on whether respondents would be liable under that standard in this case. See Brief of the SEC, Amicus Curiae, in Support of the Position of Plaintiffs-Appellants on the Issue Addressed and in Support of Neither Affirmance Nor Reversal. Petitioners' allegations do not show that any Mayer Brown lawyer "created" any specific false statement; the complaint contains only vague allegations concerning respondents' role in the formulation of Refco's offering

documents. Even under a "creator" standard, those allegations are insufficient. In sum, because no outcome in *Janus* would compel a different result here, a hold for *Janus* is unwarranted.

E. Important Policy Considerations Militate Against This Court's Review

Petitioners advance several policy arguments in favor of this Court's review, Pet. 27-29, but none withstands scrutiny. Policy considerations strongly favor permitting the Second Circuit's decision to stand.

1. Petitioners defy reality by contending that the Second Circuit "immunized a wide class of persons" from the consequences of violating the securities laws. Pet. 27. The Second Circuit did not immunize anyone. The type of conduct alleged by petitioners is fully subject to civil enforcement by the SEC and criminal enforcement by the Department of Justice. This Court observed in *Stoneridge* that the SEC's enforcement power is far from toothless, and that "criminal penalties are a strong deterrent." 552 U.S. at 166. Those comments ring particularly true here because respondent Collins was sued by the SEC for aiding and abetting securities fraud and was criminally prosecuted for the same conduct. The addition of class action liability is not necessary to achieve deterrence and has many countervailing detriments.

Nor did the decision below immunize parent corporations or subsidiaries that use one another to disseminate false statements from private civil damages claims, as petitioners contend. Pet. 27-28. This case does not involve those situations, and the Second Circuit did not address them. Similarly, this case does not involve fraudfeasors who "adopt[] a false identity, or speak[]

anonymously." Pet. 28. Investors knew exactly who was speaking in Refco's offering documents: Refco.

2. In *Stoneridge*, this Court made clear that because of "[c]oncerns with the judicial creation of a private right of action" under Section 10(b), the "private right should not be extended beyond its present boundaries." 552 U.S. at 165. Any such expansion "is for Congress," not the judiciary. *Id.* Congress has declined many opportunities to expand the scope of secondary actors' liability to private plaintiffs under Rule 10b-5. It did so again quite recently, even though advocates of expansion argued that *the result in this case* called for legislative overruling. Congress rejected an amendment to Section 20(e) that would have authorized a private right of action against "any person that knowingly provides substantial assistance to another person in violation of this title." 156 Cong. Rec. S3569, S3618 (May 12, 2010). Rather, Congress directed the Comptroller General to "conduct a study on the impact of authorizing a private right of action against any person who aids or abets another person in violation of the securities laws," including "a review of the role of secondary actors in companies issuance of securities." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929Z, 124 Stat. 1376, 1871 (2010). This Court should not short-circuit the process mandated by Congress by granting review on that issue.

3. Although it is not necessary to expound on their views at length here, in the court below numerous amici supported respondents for policy reasons. See Brief of Former SEC Commissioners and Officials, Law and Finance Professors, and Securities Law Practitioners as

Amici Curiae in Support of Appellees and Affirmance;[7] Brief of Amici Curiae Law Firms in Support of Defendants-Appellees and Affirmance of the Decision Below (stating that an amorphous liability standard "could have a serious effect on how law firms provide services to their clients," conflict with existing ethical duties, and ultimately "impair the availability and increase the costs of legal services that are, on the whole, highly beneficial in advancing the cause of securities law compliance").

[7] This group of amici included former SEC commissioners Harvey L. Pitt, Edward H. Fleischman, and Joseph A. Grundfest; former SEC officials Simon M. Lorne and Richard H. Rowe; professors such as Richard A. Epstein of the University of Chicago, Allen Ferrell of Harvard Law School, and Larry E. Ribstein of the University of Illinois; and practitioners such as James H. Cheek III and Stanley Keller.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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